

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 72 percent work disability calculated according to K.S.A. 44-510e. The respondent and its insurance carrier requested this review and ask the Appeals Board to review the Judge's finding of nature and extent of disability. That is the sole issue on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

Claimant was employed by the respondent as the manager of customer service and in that position procured and inspected airplane parts. On January 5, 1994, claimant injured his hips, right shoulder, head, and back in a car accident while running errands for the respondent. After his accident, the claimant obtained chiropractic treatment from Dr. Douglas J. Schoenhofer and medical treatment from Drs. Hays, Clark and Blaty.

When claimant was ultimately released to return to work with restrictions in January 1995, respondent's Wichita division had been sold. Although respondent remains in business in other areas in the United States, it has not offered employment to claimant. At both the regular hearing in July 1995 and his deposition one month later, claimant testified he had not been employed since his accident. However, claimant testified that a friend was considering hiring him as general manager of O'Dell & Sons, a tractor supply company. In his deposition claimant explained that his friend was not certain whether he could afford to hire claimant. Claimant also testified he had assisted his friend for approximately one week by answering the telephone and looking up parts at a time when most of his friend's employees had suddenly quit.

At the regular hearing claimant testified that he continues to experience back and right shoulder pain. In addition, he testified the document listing his job tasks, labeled Claimant's Exhibit 1, contains an accurate list of the tasks for each job that he has held over the last 15 years. During his deposition claimant also testified he hurt his lower back in 1978 and received some medical treatment.

Claimant presented the testimony of Lawrence R. Blaty, M.D., a board-certified physiatrist, who limits his practice to physical medicine rehabilitation. Dr. Blaty first saw claimant in October 1994 when he was referred for an evaluation. At the initial visit the doctor diagnosed diffuse upper back strain and stiffness and recommended physical therapy programs that concentrated on myofascial relief. The doctor referred claimant for a functional capacity evaluation which produced inconsistent results and indicated some self-limiting behavior. When asked his opinion, Dr. Blaty stated he did not believe claimant was trying to manipulate the test but that the therapist merely thought claimant could have performed more than he did before he reported limiting pain. Despite the results of the evaluation, the doctor restricted claimant to light activities, including no level lifting, carrying or pushing greater than 20 pounds occasionally or 10 pounds frequently, and limited claimant to occasional squatting and bending. He believes claimant has sustained a 5 percent whole body functional impairment as a result of the car wreck. When asked about claimant's history of back problems and whether claimant had any preexisting impairment, the doctor stated:

"Q. Doctor, you have no history of any pre-existing problems with this man's upper or lower back or shoulder muscles; is that correct?

"A. That is correct. The only thing that was indicated to me was a previous, and this is how he described it, and I really didn't have much

regarding a previous herniated disc for which he was undergoing chiropractic treatment and I am not sure -- I don't believe that is in the same area though.

"Q. Doctor, do you know whether he even has a herniated disc?

"A. No, I haven't seen anything documented. I asked him if he had any previous problems with his back and he said, well, I have had a herniated disc that I have had chiropractic treatment on and that was basically it.

"Q. Do you know if Mr. Draper has had any MRIs, myelograms or CT scans to document a herniated disc?

"A. No.

"Q. And do you have an opinion whether he has any previous permanent impairment that existed prior to the time you saw him?

"A. I don't have anything to base the fact that he has a permanent impairment.

"Q. And if he did have a permanent impairment previously the five percent of function that you have given him is in addition to any he may have had, would that be accurate?

"A. Depending on what his injuries were previously, that I am not aware of.

"Q. Assuming they were in a different location, the five percent would be in addition to that?

"A. Yes, assuming it's a different problem."

The Appeals Board notes that claimant testified at his deposition that he did not recall seeing a chiropractor for his back until after the January 1994 accident.

At his deposition Dr. Blaty was asked to review the exhibit that claimant had indicated accurately listed the job tasks he had performed over the last 15 years. After reviewing the documents, the doctor testified that claimant could no longer perform 37 percent of the tasks he performed for the respondent, 40 percent of the tasks he performed at Boeing and 56 percent of the tasks he performed at the Draper Co., for an average of 44 percent of the job tasks he performed over the last 15 years.

Claimant was seen one time by Dr. Philip R. Mills. Although he believes claimant has a 5 percent functional impairment as a result of the car wreck, any restrictions that Dr. Mills would place upon claimant would be for the preexisting ruptured disc that claimant stated he had. However, during cross-examination Dr. Mills testified that he did not find any signs or symptoms of a herniated disc, nor did he have or review any medical records that indicated claimant had a herniated disc before the January 1994 accident.

Respondent presented the testimony of Karen Terrill who testified that she saw claimant at O'Dell & Sons and that he appeared to be working.

Based upon the above evidence, the Administrative Law Judge found claimant had sustained a 72 percent work disability under the provision of K.S.A. 44-510e. The Judge found claimant had proven a 44 percent loss of ability to perform the work tasks that he had performed during the 15 years preceding the date of accident and had also proven a 100 percent difference between the average weekly wage claimant was earning on the date of accident and his present wage. As required by statute, the Judge averaged those percentages to arrive at a 72 percent work disability.

The respondent argues the Administrative Law Judge erred because he did not consider Dr. Mills' testimony that claimant's injury did not warrant restrictions or limitations greater than what he should have already been observing due to the preexisting herniated disc. The respondent further contends that based upon Dr. Mills' testimony claimant has not lost any of his ability to perform his former job tasks. Respondent also argues Dr. Blaty's opinions are not credible because he based his restrictions upon an invalid functional capacity evaluation and, therefore, Dr. Mills' opinions are more credible. Respondent contends that Dr. Blaty's opinion regarding task loss is without foundation because the doctor did not personally prepare the task list. Therefore, the respondent argues it was denied the opportunity to challenge the foundation, opinions, and conclusions of the individual who prepared the list. Finally, respondent contends that the claimant was employed at O'Dell & Sons and, therefore, he is not entitled to the 100 percent wage loss found by the Judge.

The Appeals Board finds respondent's arguments are without merit. First, the evidence failed to establish that claimant had a herniated disc or restrictions before the January 1994 work-related accident. Second, although Dr. Blaty indicated the results of the functional capacity evaluation were inconsistent, he testified with certainty that claimant would not be able to perform those work tasks that the doctor identified would be beyond claimant's capabilities. Third, claimant testified that the task list that was given Dr. Blaty for review was complete and accurate. Claimant established the validity of the information contained in that document and, therefore, established the foundation for its use by Dr. Blaty. Fourth, claimant admits that he helped his best friend at O'Dell & Sons by answering the telephone and performing other odd tasks when his friend's employees walked off the job. However, respondent presented no evidence that claimant received wages for work performed anywhere since January 1994. To the contrary, claimant's testimony is uncontroverted that he has been unable to obtain employment since his accident.

The findings and conclusions of the Administrative Law Judge are hereby adopted by the Appeals Board to the extent they are not inconsistent with the findings and conclusions specifically set forth above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated October 31, 1995 should be, and hereby is, affirmed.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Stanley M. Draper, and against the

respondent, Chromalloy Aircraft Structures, and its insurance carrier, National Union Fire Insurance Company of New York, for an accidental injury which occurred January 5, 1994 and based upon an average weekly wage that qualifies for the maximum weekly benefit for 55.31 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$17,312.03, followed by 264.18 weeks at the rate of \$313.00 per week or \$82,687.97 for a 72% permanent partial general disability, making a total award of \$100,000.00.

As of March 15, 1996, there is due and owing claimant 55.31 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$17,312.03, followed by 58.98 weeks of permanent partial disability compensation at the rate of \$313.00 per week in the sum of \$18,460.74, for a total of \$35,772.77 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$64,227.23 is to be paid for 205.2 weeks at the rate of \$313.00 per week, until fully paid or further order of the Director.

The Appeals Board adopts as its own the order of the Administrative Law Judge regarding payment of costs.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, Kansas
Michael D. Streit, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director